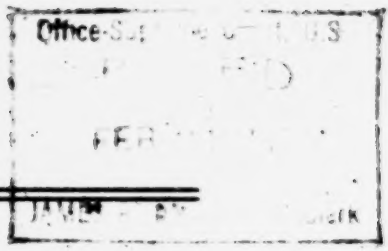

In the Supreme Court of the United States

No. [redacted] 36

OCTOBER TERM, 1956

CARL C. INMAN,
Petitioner,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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To the Supreme Court of Ohio.

Carl C. Inman, Petitioner, prays that a writ of certiorari issue to review a final judgment of the Supreme Court of Ohio entered in the above entitled case on November 12, 1958, and its refusal to reconsider entered on December 3, 1958.

OPINIONS BELOW.

The Journal Entry of judgment of the Court of Common Pleas is unreported and appears in the transcript of the record. The opinion of the Court of Appeals of Summit County, Ohio, is unreported and appears in the Appendix, page 17, *infra*. The decision of the Supreme Court of Ohio dismissing petitioner's appeal "filed as of right herein" for the reason that "no debatable constitutional question is involved," is reported in 168 O. S. 335, and is printed in the Appendix, page 31, *infra*. The decision of the Supreme Court of Ohio overruling the motion of

petitioner for an order directing the Court of Appeals of Summit County, Ohio, to certify its record appears in 31 Ohio Bar No. 44, and is printed in the Appendix, page 31, *infra*. The decision of the Supreme Court of Ohio denying the application for rehearing appears in 31 Ohio Bar, No. 47, and is printed in the Appendix, page 32, *infra*.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on November 12, 1958, and its denial of rehearing was rendered on December 3, 1958.

Jurisdiction of this Court is invoked under the provisions of 28 U. S. C. Sec. 1257 (3).

QUESTIONS PRESENTED.

1. Did the Court of Appeals of the State of Ohio err in holding as a matter of law that the evidence adduced does not show any negligence of respondent, and does not permit the inference, or authorize the jury to infer, that the respondent was negligent as charged and submitted?

2. In an action under the Federal Employer's Liability Act, 45 U. S. C. 51 *et seq.*, where the employer sent an employee as a crossing watchman, in the night season, to stand directly in the intersection of two heavily traveled highways, immediately west of its railroad tracks, which crossed both highways diagonally at the intersection, and the employee's duties required him to face the train, with his back to traffic, as the train was passing over the crossing, thus creating a likelihood that the employee might be struck by a vehicle of a third party, which in fact occurred, can the state court say as a matter of law that there was no actionable negligence?

3. In an action under the Federal Employer's Liability Act, can it be said that where the employee is struck by an automobile driven by a third party, that defendant must be exculpated, as a matter of law, because the automobile driver violated traffic statutes or ordinances?

4. Has the State Court of Appeals properly read into the Federal Employer's Liability Act, a requirement that where the injuries resulted "in part" from the employer's negligence, in addition thereto such negligence must be a proximate cause of the injury, in the common law legal sense before liability attaches?

STATUTES INVOLVED.

The Federal Employers' Liability Act:

"Every common carrier by railroad while engaging in commerce between any of the several states or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." April 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 51.

Judicial Code:

"**§ 1257. State Courts; Appeal; Certiorari.**

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. Code, Sec. 1257.

STATEMENT OF THE CASE.

This action was brought in the Common Pleas Court of Summit County, Ohio, under the Federal Employers' Liability Act, 45 U. S. C. 51, *et seq.*, against The Baltimore & Ohio Railroad Company, to recover damages for injuries sustained through the negligence of the railroad in assigning petitioner, an employee, as a crossing flagman under evidence showing that his place of work, and respondents method of work were unsafe, and dangerous, where he was struck by the automobile of a third person, the employer being aware of conditions which created a likelihood that the employee would be struck by a motor vehicle just as in fact occurred.

Tallmadge Avenue (State Route 18) a main traffic artery extends east and west in the City of Akron, Ohio, and is intersected on an angle by Home Avenue, a street extending in a northeasterly and southwesterly direction. Respondent operates a 3 track line diagonally across the intersection of both streets. Home Avenue intersects Tallmadge Avenue along the westerly tracks of the respondent so that traffic approaching from the southwest on Home Avenue is able to make a left hand turn into Tallmadge Avenue. A little after midnight on January 2, 1957, a freight train of the defendant was approaching the crossing, traveling in a northwesterly direction, and in the performance of his duties, petitioner, stationed himself directly, in the intersection of Tallmadge Avenue and Home Avenue, 3 or 4 feet west of the tracks.

He flagged motor traffic moving in all four (4) directions to a stop until the train reached the crossing (R. 7) This ended petitioners duty to stop the traffic and he then had to and did face the train to look for hot boxes (R. 172) and to look for trains approaching from the opposite direc-

tion (R. 8). While in this position he had his back to traffic on both highways west of the tracks (R. 10) and just as the caboose reached the crossing, petitioner began to turn and face traffic west of the tracks, to get the traffic moving (R. 10) when an automobile on Home Avenue "jumped the gun" and without any signal or warning started up and made a left hand turn into Tallmadge Avenue (R. 71) before petitioner had a chance to face traffic and signal the vehicles forward (R. 10).

The railroad was or should have been aware of conditions which created a likelihood that the employee would be struck by a motor vehicle (R. 71) just as in fact occurred.

The jury was carefully instructed, that if petitioner's injury resulted solely from the negligence of James Ball, the operator of the automobile which struck him, the verdict should be for respondent (R. 315).

The jury was properly instructed upon the issue of respondent's negligence, and its effect if it had any part in producing petitioner's injury (R. 306).

The jury was further carefully instructed as to its verdict if it should find that petitioner's injury resulted from his own acts and conduct (R. 311).

The jury was further carefully instructed as to the effect of the combined and concurrent negligence of both petitioner and respondent as causative factors in petitioner's injury (R. 315-316).

The jury returned a general verdict in favor of petitioner for $25,000.00, upon which judgment was entered.

The jury also answered two interrogatories submitted to them as follows:

> No. 1. Do you find that the defendant was negligent? Answer: "In Part."

No. 2. If your answer to question No. 1 is in the affirmative, state of what said negligence consisted. Answer: "Not providing enough protection." (R. 323.)

Upon appeal, the Court of Appeals for Summit County, Ohio, reversed the judgment and rendered final judgment for respondent. The Supreme Court of Ohio, refused petitioner's motion to Certify the Record and denied rehearing.

REASONS FOR GRANTING THE WRIT.

1(a) The decision herein is not in accord with the applicable decisions of this Court.

I.

The State Court of Appeals, by its decision and judgment in this case, denied petitioner a right specially set up and claimed by him under the Federal Employer's Liability Act, namely, the right to have this case submitted to a jury for the determination of whether his injury resulted "in whole or in part" from negligence of the respondent.

Bailey v. Central Vermont R. Co., 319 U. S. 350;
Schultz v. Pennsylvania R. Co., 350 U. S. 523;
Tennant v. Peoria & P. U. R. Co., 321 U. S. 29;
Moore v. Terminal R. Assn. of St. Louis, 79 S. Ct. 2;
Rogers v. Missouri Pacific R. Co., 352 U. S. 500.

II.

The State Court of Appeals, in holding that there was "no duty imposed on defendant to anticipate such an occurrence as eventuated" and "no negligence for failure to guard against it" has decided Federal questions of sub-

stance in a way not in accord with the applicable and controlling decisions of this Court in that:

(A) The State Court of Appeals, in holding as a matter of law that respondent was not negligent, failed to give petitioner the benefit of all the facts and circumstances in evidence in his favor, and all the inferences of fact which may reasonably be drawn from the evidence favorable to him.

Webb v. Illinois Central R. Co., 352 U. S. 512;
Wilkerson v. McCarthy, 336 U. S. 53;
Lavender v. Kurn, 327 U. S. 645.

(B) The State Court of Appeals determined the question of respondent's negligence, not from the facts and inferences as a whole in their interwoven relationship where each imparts character to the others, but from only a part of the facts and circumstances, with even those in that part separated and considered apart from each other.

Union Pacific R. Co. v. Hadley, 246 U. S. 330, 332;
Blair v. Baltimore & O. R. Co., 323 U. S. 600, 604;

(C) The State Court of Appeals also erroneously determined the issue of causation of petitioner's injury by its own independent resolution of the facts and circumstances in evidence, and a reweighing of the evidence and the inferences to be deduced therefrom.

Rogers v. Missouri Pacific R. Co., supra, 352 U. S. 500;
Stinson v. Atlantic Coast Line R. Co., 355 U. S. 62.

1(b) The action of the State Court constituted an invasion of the province of the jury contrary to the Seventh Amendment of the United States Constitution.

The Court below in deciding "that the plaintiff, while in the discharge of his duties as crossing watchman, would be injured by the actions of a drunken driver, violating five traffic statutes and ordinances, was not, in our opinion, such an occurrence as, under the evidence of this record, was reasonably forseeable by defendant" constitutes a clear invasion of the jury's province, overlooking the decisions of this Court to the effect that under the Federal Employer's Liability Act, *supra*, the jury's power to draw inferences is greater than at common law.

Rogers v. Missouri Pacific R. Co., supra, 352 U. S. 500;

Moore v. Terminal R. Assn. of St. Louis, supra, 79 S. Ct. 2.

The deprivation of a constitutional right by the violation of this fundamental rule has many times been made the basis for granting writs of certiorari by this Court. Therefore, it is respectfully submitted that the Court below, by substituting its view of the case for that of the jury invaded the province of the jury, contrary to the rights of petitioner under the 7th Amendment to the Constitution of the United States.

2. Argument amplifying the reasons for allowance of the writ.

The State Court of Appeals overlooked certain material facts established by the evidence in proceeding on the theory "there is further no evidence of prior occurrences of the kind here under consideration, which would

put the defendant on notice of likelihood of injuries to one in the position of plaintiff."

Sam Bailey, a witness to the accident, was well aware of the disregard for signals on the part of vehicular drivers and of their habit of "jumping the gun" at this intersection. He testified (R. 71):

> "A. I had stopped for the train and the train was just about to clear the crossing, I believe the cab was coming over the crossing at the time. *This car, like a lot of them I seen there, jumping the gun,* seen the tail end of the train coming up went around the cars, this car came around several cars that was on Home Avenue and turned west on Tallmadge Avenue and hit the watchman."

The defendant could foresee the possibility that a driver of a motor vehicle would disregard the crossing signals, "jump the gun" and make a left hand turn from Home Avenue to Tallmadge Avenue. Other drivers had previously done so.

The overlooking of the material facts above mentioned, leads to a nullification of the effect of the controlling line of Supreme Court decisions.

Raymond B. Peterson, the conductor on the train and a witness for the defendant, was well aware that petitioner's duties required him to face the train with his back to traffic, while the train was passing the intersection. He testified (R. 172):

> "Q. You say it was the watchman's duty to keep watching your train as it went by to see if there were any hot boxes or anything wrong with your train and if there was he'd give you a signal? That's customary? A. That's customary, other duties permitting he is generally required to do that.
>
> Q. He had watched trains you had been on? (R. 172.) A. Yes, sir.

Q. And if he saw something wrong he'd give you a signal? A. That's right." (R. 172.)

Petitioner testified (R. 7):

"Q. Any reason you went west of the west bound tracks? A. That was instructions, an eastbound train, a train going east the flagman should be on the west side of it so he can see if there's anything coming on the westbound.

Q. Who gave you those instructions? A. For one, Mr. Gamble, when he was instructing me about flagging up there because I had never done any flagging on the railroad.

Q. What was Mr. Gamble's capacity with the railroad? A. Crossing watchman.

Q. And what did you do when you got to the center of Tallmadge Avenue? A. By the time I got there the train was almost close enough—I had to look at traffic all four ways, if there was room I let two or three cars go through, if there wasn't I blew my whistle, turned my lantern so each one could see it, this shield on it, it's a fourteen inch shield. (R. 8.)

Q. Which way did you face then after the train started to pull across the crossing? A. After the crossing was blocked you have reference to? (R. 8.)

Q. Yes. A. I looked at the train. I looked away, that time, until I could see where the caboose was, then I had to look north towards Cuyahoga Falls to see if I could get a reflection, that was looking over my left shoulder. (R. 8.)

Q. What was your reason for looking toward Cuyahoga Falls? A. One to see if there was a reflection of a headlight coming around the curve. I couldn't see the light down at Evans Avenue. (R. 8.)

Q. Why couldn't you? A. The eastbound train was blocking it. (R. 8.)

Q. Now while you were standing facing the way you were, were you able to see traffic back on Home Avenue at that time? A. *No.* (R. 10.)

Q. Were you able to see traffic that was west of you that was going east? A. *No.* (R. 10.)

Q. All right, and then what happened, tell the jury in your own words, what happened? A. I turned my head to look towards Cuyahoga Falls, that would be north, and I was watching for a train to come around there before I'd clear the crossing to let traffic through, *and just as the caboose got up on the crossing I went to make just a step backwards and a turn, and that's when I was hit.* From then on I didn't remember anything. (R. 10.)

Q. Had you signalled traffic forward? A. No, sir." (R. 10.)

In the instant case the jury was justified in finding that the method of performing his work required a division of petitioner's attention; that he was thrust into an unsafe place to work, in the night season, in the intersection of two of the heaviest travelled and most dangerous traffic arteries in the State of Ohio, where a lot of other cars had "jumped the gun" and where petitioner, while performing his work was struck before he could face traffic. Petitioner was no Janus bearing two faces and able to look in both directions at the same time.

The automobile which struck plaintiff had been stopped on Home Avenue about 60 feet away from the point where plaintiff was standing (R. 35).

The jury could reasonably infer that had plaintiff been permitted to remain with his face toward vehicular traffic on Home Avenue and Tallmadge Avenue he could and would have jumped out of harms way; that because the petitioner's duties divided his attention the importance of the automobile drivers conduct was enlarged.

To use the language of Mr. Justice Brennan in *Rogers v. Missouri Pacific R. Co.*; 352 U. S. 500, 503:

"These were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did."

Paraphrasing the language of Mr. Justice Douglas in the *Bailey* case, *supra* (319 U. S. 350).

"* * * These were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing the petitioner with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * as well as issues involving controverted evidence * * *. To withdraw such a question from the jury is to usurp its functions." (Words in italics paraphrased, and authorities cited are omitted.)

Clearly the state court in the instant case, in reaching its conclusion that the evidence failed to show negligence on the part of respondent improperly reweighed the evidence and came to an independent conclusion thereon in conflict with the findings of a fully and properly instructed jury. *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29. *Wilkerson v. McCarthy*, 336 U. S. 53.

3. The decision of the State Court in the instant case that the occurrence was unforeseeable is in direct conflict with the decisions of this Court.

It cannot be said that the defendant must be exculpated because the automobile driver's conduct was criminally negligent or reckless. The evidence shows that such conduct on the part of automobile drivers had hap-

pened before and was foreseeable. Such drivers are part of the facts of life, as police records demonstrate, and defendant owed plaintiff a duty to take such behavior into account.

The automobile driver's negligence no more relieved this defendant from its obligation than did the criminal act of a third party relieve the defendant in *Cahill v. New York, New Haven & Hartford R. Co.*, 350 U. S. 898 (1956) reversing 224 F. (2d) 637; *Smalls v. Atlantic Coast Line R. Co.*, 348 U. S. 946 (1955), reversing 216 F. (2d) 842. In *Lillie v. Thompson*, 332 U. S. 459 (1957), the Court said at page 462:

> "That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence" (Italics supplied).

This Court in *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521 (1957) in its opinion said:

> "It was not necessary that respondent be in a position to foresee the exact chain of circumstance which actually led to the accident."

This Court in *Cahill v. The N. York, N. Haven & Hartford Railroad Co., supra*, 350 U. S. 898 (1956), in reversing the Second Circuit, 224 F. (2d) 637, impliedly sanctioned the views expressed in the minority opinion of the Circuit Court as follows:

> "My colleagues' opinion seems to me to amount to saying that, as a matter of judicial notice, such a man could not have jumped to safety when a truck, which had been stationary, four feet away, started in motion. With that position I do not agree. A truck cannot leap forward from rest like a greyhound or a

modern sport-model passenger automobile. I think that we cannot hold that a jury acted unreasonably in believing that an agile young man could not here have rescued himself, had he been looking directly at the truck when it began to move towards him.

Nor do I agree that defendant must be exculpated because the truckdriver's conduct was criminally negligent or reckless. Since such drivers are part of the facts of life, as police records demonstrate, defendant owed plaintiff a duty to train him to take such behavior into account. Such an 'intervening' factor does not exculpate in such circumstances."

4. The decision of the Court of Appeals in the instant case that the negligence of the defendant must be the "proximate cause" in the common law sense, in these Federal Employers' Liability Act cases, is in direct conflict with the latest decisions of the United States Supreme Court.

The opinion of the court below in deciding that "The basis for recovery by an injured employee under the Federal Employers' Liability Act is therefore negligence of the employer in failing to provide a safe place for the employee to work, which negligence proximately causes, in whole or in part, the injuries of which complaint is made," is to be interpreted as meaning that the negligence of the carrier, in addition to being responsible in part for the injury, must also be the "proximate cause" of such injury in the common law sense before liability attaches. For this proposition, it cited 29 *Ohio Jurisprudence*, Negligence, Sec. 68.

That the State Court of Appeals misapprehended the intent of the Federal Employers' Liability Act, that "every * * * railroad * * * shall be liable in damages * * * for such injury or death resulting in whole or *in part*, * * *

from negligence * * * of such carrier * * *" (italics supplied). 45 U. S. C. A. Section 51.

For "legal" cause, we need not and must not go beyond the wording of the Federal Employers' Liability Act. The Supreme Court so held in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, *supra*. See also *Webb v. Illinois Central R. Co.*, 352 U. S. 512, *supra*; *Shaw v. Atlantic Coast Line R. Co.*, 353 U. S. 920; *Futrelle v. Atlantic Coast Line R. Co.*, 353 U. S. 920; *Deen v. Gulf, C. & S. F. R. Co.*, 353 U. S. 925; *Thomson v. Texas & Pacific R. Co.*, 353 U. S. 926; *Arnold v. Panhandle & S. F. R. Co.*, 353 U. S. 360; *Ringhiser v. Chesapeake & O. R. Co.*, 354 U. S. 901; *McBride v. Toledo Terminal R. Co.*, 354 U. S. 517; *Gibson v. Thompson*, 355 U. S. 18; *Honeycutt v. Wabash R. Co.*, 355 U. S. 424; *Ferguson v. St. Louis-San Francisco R. Co.*, 356 U. S. 41.

CONCLUSION.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF THE COURT OF APPEALS.

STEVENS, *J.*

The action filed in the Court of Common Pleas of Summit County, Ohio, by plaintiff, sought the recovery of damages for personal injuries sustained by him while in the performance of his duties as a crossing flagman at Home and Tallmadge Avenues in the City of Akron.

The defendant in the trial court is a railroad company, engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, and the plaintiff was an employee of defendant, concededly within the class of persons entitled to the benefits of that Act.

The petition of plaintiff alleged that:

On January 2, 1952, plaintiff, while discharging his duties as crossing flagman, was standing on Tallmadge Avenue, at a point just west of defendant's tracks at the Home Avenue intersection with Tallmadge Avenue, warning the traveling public of the presence of one of defendant's trains, when he was suddenly and violently struck by an automobile being driven in a northeasterly direction on Home Avenue and making a left turn into Tallmadge Avenue at said intersection, with resultant serious injuries.

As the case was submitted to the jury by the trial court, the petition contained the following specifications of negligence:

1. "* * * the defendant negligently and carelessly ordered and directed plaintiff to perform his duties as a flagman at said crossing, when it was impossible for him to observe vehicles entering said intersection from Home Avenue and without taking any measures to prevent him from being struck, as aforesaid."

2. "* * * failed to place another employee at said crossing to watch for other trains approaching said crossing, while plaintiff was on duty flagging, to the end that plaintiff could keep a lookout and watch for traffic proceeding from Home Avenue into said intersection, and particularly the vehicle that struck plaintiff as aforesaid."

For answer to the petition of plaintiff as subsequently amended, defendant admitted the following:

1. Its corporate existence as a railroad, owning and operating railroad lines through several parts of the United States, one of which lines extends into and through the City of Akron, Ohio.

2. That on January 2, 1952, plaintiff and defendant were engaged in interstate commerce.

3. That Tallmadge and Home Avenues were duly dedicated public streets in the City of Akron, which intersected.

4. On information and belief, that on or about January 2, 1952, at 12:10 a.m., while plaintiff was on duty as a flagman at the above-mentioned intersection, he was struck by an automobile and sustained some personal injuries, but denied that the same were of the nature and character alleged.

All other allegations of the petition were denied.

Upon trial to a jury, a verdict for plaintiff in the amount of $25,000 was returned, upon which judgment was duly entered.

This appeal on questions of law ensued.

The pleadings in this case do not, in terms, present the claim of plaintiff that defendant negligently failed to furnish plaintiff with a safe place to work, under the Federal Employers' Liability Act. However, in view of the pronouncement in par. 16 of the syllabus in *Denny* v.

Montour Rd. Co., 101 Fed. Supp. 735, that question was in the case, and the court was required to charge thereon.

It is stated in *Ellis v. Union Pacific Rd. Co.*, 329 U. S. 649, at p. 653:

> "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury. 45 USCA Sec. 51, 10 AFCA title 45, Sec. 51 * * *."

In *Bailey, Admx., v. Central Vermont Ry., Inc.*, 319 U. S. 350, the fourth paragraph of the syllabus states:

> "4. An employer is under a common-law duty to use reasonable care in furnishing his employees with a safe place to work."

It is thus apparent that, while the Act itself does not in terms require the employer to furnish the employee with a safe place to work, the cases decided by the Supreme Court of the United States under the Act, do impose upon the employer the common law duty to exercise reasonable care to furnish his employee with a safe place to work.

The basis for recovery by an injured employee under the Federal Employers' Liability Act is therefore negligence of the employer in failing to provide a safe place for the employee to work, which negligence proximately causes, in whole or in part, the injuries of which complaint is made.

In 29 *O. Jur., Negligence*, Sec. 68, the following appears:

> "It is a well-established rule that to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural

and probable consequence of the negligence alleged, and that it was such as might or ought to have been foreseen in the light of the attending circumstances. In contemplation of law, an injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable."

Let us now examine this record in the light of the foregoing statement of the applicable rules.

Tallmadge Avenue, an east and west traffic artery in the City of Akron, is intersected by Home Avenue, a street running in a northeasterly and southwesterly direction. Three tracks of defendant extended through the intersection of these two streets in a northwesterly and southeasterly direction, the most easterly being a switch track, the middle track the eastbound main track, and the most westerly the westbound main track.

The defendant installed the following equipment to warn the defendant and the traveling public of the approach of trains to said crossing:

Highway warning signals known as "flasher lights" at all street approaches to the crossing, consisting of two lights with red lenses directed toward approaching traffic, which, when activated, gave a flashing signal warning to motorists of the approach of a train. On the side of the body of these lights were windows which emitted a white light when the lights were in operation.

In the watchman's shanty at the southeast corner of Tallmadge Avenue, the defendant installed a warning or "tell-tale" light to warn the watchman of the approach of trains, and a listening phone on which could be heard the dispatcher at XN Tower, 1½ miles north of the crossing, issuing orders to trains and giving their location on the line.

Outside the shanty, on a 25-foot pole near the south curb of Tallmadge Avenue east of the crossing, was an amber light, which was activated and would light up when trains approached the crossing.

To the south of the crossing was a black signal on a mast 27 feet high, consisting of a disc with two red lights in a horizontal position, and two yellow lights in a diagonal position, with a white light in the center of the disc.

A red signal appeared when a westbound train was within the block, requiring the engineer of the following train to stop before reaching the signal.

A yellow signal required the engineer of a westbound train in the block to reduce his speed to 35 miles an hour.

The white light, which could be seen from the crossing, would appear when either the red or yellow signal was in operation.

When none of said lights was in operation, this indicated the absence of a westbound train from the block.

As an eastbound train approached the crossing, at a point 2066 feet south of the crossing, the wheels of the train would strike an insulated joint, which put in operation the flasher light circuit, the block signal circuit, the "tell-tale" light in the watchman's shanty, and the amber light on top of the pole near the south curb line of Tallmadge Avenue—all of which signals would remain in operation until the last car of the eastbound train passed over another insulated joint 75 feet north of the crossing, when all of said signals would discontinue operating.

Upon the approach of a westbound train to the crossing, when the wheels thereof reached a point 3455 feet north of the crossing, they would strike an insulated joint, setting into operation the block signal heretofore mentioned, the "tell-tale" light in the watchman's shanty, and the amber light south of the curb on Tallmadge Avenue.

When the wheels had reached a point 2000 feet north of the crossing, the flasher lights would be activated, and would continue to operate until the wheels of the last car passed over an insulated joint 105 feet south of the crossing, which would deactivate them.

The evidence shows all of these signals to have been in proper working order on January 2, 1952, at the time here in question.

In addition to the foregoing, the crossing flagman was furnished with one "stop" disc sign, three red flags for use by day, two red lanterns, one white lantern, and one green lantern, for use when flagging at night, six or more fusees, six or more torpedoes, and a shrill whistle.

Stop signs were erected for Home Avenue traffic approaching the crossing from the south, on the right or easterly side of Home Avenue before the tracks were reached, and near the intersection of Home Avenue where it joined Tallmadge Avenue—the latter being a main thoroughfare.

The crossing and intersection were well lighted by street lights at the time under consideration.

The plaintiff, on January 2, 1952, had been employed by defendant as a crossing watchman for about three years, working the 11 p.m. to 7 a.m. shift at the Bettes Corners grade crossing.

Shortly after midnight on said date, the tell-tale light in the watchman's shanty started flashing, indicating the approach of a train from the west, and the other warning signals heretofore described went into operation.

In accordance with his instructions, plaintiff stationed himself in the center of Tallmadge Avenue, to the west of the crossing, two or three feet west of the westerly rail of the westbound track, having with him his whistle, and lighted red and green lanterns.

When the train got close enough to the crossing, plaintiff blew his whistle and began swinging his red lantern.

While thus engaged, one James Ball was stopped on Home Avenue in a line of traffic, several cars back from the intersection of Home Avenue and Tallmadge Avenue.

There is uncontroverted evidence in this record that, at the time of plaintiff's injury, Ball was under the influence of alcohol.

As the train passed over the crossing, plaintiff took a step backward, when he was struck by Ball's automobile, which had left the northbound line of traffic on Home Avenue, and had proceeded northerly upon the left, or westerly, side thereof, to the intersection of Home and Tallmadge Avenues, where Ball, at a high rate of speed, made a short turn onto Tallmadge Avenue, and, proceeding westerly, collided with and injured plaintiff.

In so doing, Ball violated five state traffic statutes, and municipal ordinances of the City of Akron dealing with the same subjects.

At the conclusion of all the evidence, defendant moved for a directed verdict, which motion was overruled; and after the return of the verdict for plaintiff, defendant moved for a judgment notwithstanding the verdict, which motion was also overruled.

There are seventeen assignments of error presented by appellant, only a few of which will be discussed.

The assignment of error designated "1(a)" in appellant's brief dealing with the alleged inconsistency between the special findings of fact and the general verdict, is, in our opinion, completely negatived by the decision of the Supreme Court of the United States in the case of *Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U. S. 360, 1 L. Ed. 2d 889.

We find no prejudicial error in connection with this assignment.

Assignment "1(b)" asserts:

> "The Trial Court erred in overruling the motion of defendant for judgment notwithstanding the verdict, based on the failure of plaintiff's proof; the Trial Court erred in overruling the motion of defendant for a directed verdict and for judgment in its favor at the close of all the evidence."

The entire record in this case has been studied by the members of this Court, as have been the law and the cases defining the obligations of the parties to this litigation.

If the predicate for liability of defendant employer is negligence, which proximately caused, in whole or in part, the injuries complained of by plaintiff, then, as part of the subject of proximate cause, the question of foreseeability was presented.

There is no evidence in this record of failure on the part of defendant to furnish plaintiff with all of the safeguards in the performance of his work, which reasonably prudent operators of railroads furnish under like or similar circumstances. And there is further no evidence of prior occurrences of the kind here under consideration, which would put the defendant on notice of likelihood of injuries to one in the position of plaintiff.

That the plaintiff, while in the discharge of his duties as crossing watchman, would be injured by the actions of a drunken driver, violating five traffic statutes and ordinances, was not, in our opinion, such an occurrence as, under the evidence of this record, was reasonably foreseeable by defendant.

There was, accordingly, no duty imposed on defendant to anticipate such an occurrence as eventuated, and hence no negligence for failure to guard against it.

To abridge the statement of the court in *Orton v. Pennsylvania Rd. Co.*, 7 F. 2d 36, at p. 38.

> "The most that can be said for plaintiff is that the defendant created a situation in which" the negligence of James Ball "operated to bring about the" injury * * *. "Defendant's act was merely a condition and in no sense a concurring proximate cause of the injury."

We hold that the court prejudicially erred when it overruled defendant's motion for a directed verdict, made at the conclusion of all the evidence, because there was a complete failure of proof to establish the negligence alleged in the petition, or any negligence of defendant which proximately caused, in whole or in part, the injuries to plaintiff. *Lavender, Admr., etc., v. Kurn, et al., etc.*, 327 U. S. 645, 90 L. Ed. 916, par. 4 of syllabus.

Likewise, there was prejudicial error in overruling the motion of defendant for judgment notwithstanding the verdict, for the reasons above set forth.

It is next asserted that "The trial court erred in overruling the separate motions of defendant to withdraw each specification of negligence" contained in plaintiff's petition as heretofore set forth "from the consideration of the jury at the close of all the evidence."

Inasmuch as we have determined that there was a complete failure of proof to substantiate the allegations of negligence contained in the petition, or included therein under the pronouncements of the federal courts, we conclude that the motions to withdraw the specifications of negligence from the consideration of the jury, at the close of all the evidence, should have been sustained; and that the court prejudicially erred in overruling said motions.

Assignment of error No. 7 charged that "The trial court erred in giving written instructions of law before argument requested by the plaintiff."

Instruction 2 stated:

"* * * the defendant * * * owed a duty to its employee Carl C. Inman to use reasonable care to provide him with a reasonably safe place in which to work * * *."

Instruction 4 provided:

"* * * that reasonable care is that degree of care which a reasonable man maintains in similar circumstances. The reasonable care which the defendant railroad owed to plaintiff * * * was that degree of care which a reasonably prudent person operating a railroad would use, having in mind the dangers of such an operation and the requirements of reasonably providing for the safety of the railroad's employees."

It is urged that these instructions were prejudicially erroneous because they introduced an issue not raised by the pleadings—viz., whether defendant exercised reasonable care to provide plaintiff with a reasonably safe place to work.

The case of *Denny v. Montour Rd. Co. supra*, paragraph 16 of the syllabus, makes appellant's contention in this respect untenable.

As to the other claims of appellant, concerning the special charges before argument requested by plaintiff and given by the court, we find them not to be well taken.

The next error assigned by appellant is, that "The trial court erred in refusing to give written instructions of law before argument requested by defendant."

The defendant requested the court to give defendant's written instructions 4, 5, 6, 7 and 8 before argument, which requests, as to all of said instructions, were refused by the court.

Each of those instructions contained a statement of a statutory traffic provision in the words of the statute, together with the following statement:

> "* * * the court further says to you that under the undisputed evidence of this case, the operator of the motor vehicle which came into collision with plaintiff violated this requirement of law and that defendant, in the exercise of ordinary care to provide plaintiff a reasonably safe place to work, was not required to anticipate or foresee such violation."

The violation of all of said statutes by Ball, the driver of the auto which struck plaintiff, is not denied.

There is contained in this record no evidence of previous occurrences of like nature at this crossing, involving injury to a crossing watchman.

It is stated in 29 *O. Jur.*, Negligence, Sec. 95:

> "It is a well-established rule that, in the absence of knowledge to the contrary, an individual to whom a duty is owed has a right to assume that it will be performed. This rule applies to duties arising by force of statutes or ordinances * * *."

Henderson v. Cleveland Ry. Co., 123 O. S. 468, is cited as supporting authority, as is *Cleveland Ry. Co. v. Goldman*, 122 O. S. 73.

All of the statutes in question were passed for the benefit of users of the public highways, to which class both plaintiff and defendant belonged, and Ball owed to both plaintiff and defendant the duty to comply with the statutory provisions; and, in the absence of knowledge that Ball refused to comply with his statutory duties, both plaintiff and defendant had a right to assume that he would comply therewith.

As bearing upon the question of whether the defendant exercised ordinary care in providing the plaintiff with a reasonably safe place to work, it is our conclusion that, relating to the question of foreseeability, in connection with the subject of proximate cause, the five requests of

defendant to charge before argument should have been given, and that the refusal to so charge constituted prejudicial error.

There was also prejudicial error because of the refusal of the court to include the contents of the requested charges before argument, or a correct statement of law on the subject matter of each, in its general charge, upon being requested so to do by defendant.

There was error in the charge of the court in stating that James Ball, the operator of the motor vehicle which struck plaintiff, was guilty of negligence as a matter of law, without instructing the jury of what that negligence consisted.

We further hold that the trial court prejudicially erred in overruling the defendant's motion for a new trial; that the verdict and the judgment entered thereon are not sustained by any probative evidence; and that the judgment is contrary to law.

As to the other errors assigned but not discussed herein, we hold none of them to have constituted prejudicial error.

The judgment is reversed, and this Court will enter the judgment which the trial court should have entered. Final judgment in favor of defendant will be entered, at the costs of plaintiff.

HUNSICKER, *P.J.*, and DOYLE, *J.*, concur.

ORDER OF THE COURT OF APPEALS.

The said parties appeared by their Attorneys, and this cause came on to be heard upon the Notice of Appeal of said The Baltimore and Ohio Railroad Company, Defendant-Appellant herein, together with the Assignments of Error of said Appellant, a Transcript of the Docket or Journal Entries of the Court of Common Pleas of Summit County, Ohio, and such original papers, or transcripts thereof, as were necessary for said appeal, filed therewith in the said Court of Common Pleas of Summit County, Ohio, wherein said Carl C. Inman was Plaintiff and said The Baltimore and Ohio Railroad Company was Defendant, mentioned and referred to in said Notice of Appeal, and briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, this Court finds that in the record and proceedings aforesaid, there is error manifest upon the face of the record to the prejudice of the Appellant, in this, to-wit:

(a) That said Court of Common Pleas erred in overruling the motion of said Defendant for a directed verdict and for judgment in its favor at the close of all the evidence, because there was a complete failure of proof to establish the negligence alleged in the petition;

(b) That said Court of Common Pleas erred in overruling the motion of said Defendant for judgment notwithstanding the verdict, because there was a complete failure of proof to establish the negligence alleged in the petition;

(c) That said Court of Common Pleas erred in overruling the separate motions of said defendant to withdraw each specification of negligence from the

consideration of the Jury, made at the close of all the evidence;

(d) That said Court of Common Pleas erred in refusing to give written instructions of law numbered 4, 5, 6, 7 and 8 before argument requested by said Defendant;

(e) That said Court of Common Pleas erred in refusing to give to the Jury each of said written instructions of law numbered 4, 5, 6, 7 and 8 as a part of the general charge, upon being requested so to do by said Defendant;

(f) That said Court of Common Pleas erred in refusing to correctly charge the Jury, as a part of the general charge, on subject matters contained in each of said written instructions of law numbered 4, 5, 6, 7 and 8, as requested by said Defendant;

(g) That said Court of Common Pleas erred in its general charge by stating that James Ball, the operator of the motor vehicle which struck said Plaintiff, was guilty of negligence as a matter of law, without instructing the Jury of what that negligence consisted;

(h) That said Court of Common Pleas erred in overruling the motion of said Defendant for a new trial;

(i) That the verdict of the Jury and the Judgment rendered thereon by said Court of Common Pleas are not sustained by any probative evidence;

(j) That the Judgment of said Court of Common Pleas is contrary to law;

and in that said Court of Common Pleas entered judgment for said Plaintiff-Appellee, when such judgment should have been entered for said Defendant-Appellant.

It is, therefore, considered, ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Summit County, Ohio be and the same is hereby reversed and held for naught. And this Court coming now to render the judgment which the Court of Common Pleas of Summit County, Ohio, ought to have rendered, final judgment is now entered in this Court for said Defendant-Appellant.

It is further ordered that this cause be remanded to the Court of Common Pleas of Summit County, Ohio, to carry this judgment into effect and for execution; and that said Plaintiff-Appellee pay the costs of this proceeding taxed at $ and in default thereof that an execution issue therefor.

To all of which said Plaintiff-Appellee, by counsel, excepts.

/s/ OSCAR HUNSICKER,
Presiding Judge for the County.

ORDER, SUPREME COURT OF OHIO, DENYING MOTION TO CERTIFY RECORD.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Summit County, upon the motion of the appellee to dismiss the appeal, filed as of right herein and was argued by counsel.

On consideration whereof, it is ordered, and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellant its costs herein expended, taxed at $

ORDERED, that a special mandate be sent the Court of Common Pleas of Summit County, to carry this judgment into Execution.

ORDERED, that a copy of this entry be certified to the Clerk of the Court of Appeals of Summit County, "for entry."

ORDER, SUPREME COURT OF OHIO, DISMISSING THE APPEAL.

It is ordered by the Court that this motion be, and the same hereby is, overruled.

ORDER, SUPREME COURT OF OHIO, DENYING APPLICATION FOR REHEARING.

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.